

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

STATE OF OKLAHOMA, <i>et al.</i>)	
)	
Plaintiffs,)	
)	
v.)	Case No. 4:05-cv-00329-GKF-PJC
)	
TYSON FOODS, INC., <i>et al.</i>)	
)	
Defendants.)	
)	

**DEFENDANTS’ JOINT MOTION *IN LIMINE* TO EXCLUDE EVIDENCE OF
DEFENDANTS’ ALLEGED WASTE WATER TREATMENT PLANT DISCHARGES
AND INTEGRATED BRIEF IN SUPPORT**

Defendants respectfully move *in limine* under Federal Rules of Evidence 402 and 403 to exclude evidence quantifying or attributing waste water treatment plant (“WWTP”) discharges in the IRW to any Defendant.

BACKGROUND

Plaintiffs’ Second Amended Complaint alleges that Defendants have polluted the Illinois River Watershed (“IRW”) through surface-water runoff from fields that have been fertilized with poultry litter. Defendants previously sought to dismiss this action, arguing that the Clean Water Act preempts these claims. *See Tyson Foods, Inc.’s Motion to Dismiss Counts 4-10 of the First Amended Complaint*, Dkt. No. 66; *Peterson Farms, Inc.’s Motion to Dismiss or, in the Alternative, Motion to Stay Proceedings Pending Appropriate Regulatory Action*, Dkt. No. 75. As this Court knows, the Clean Water Act provides a comprehensive system whereby pollution from “point sources” such as WWTPs are regulated and permitted. Indeed, WWTP discharges in Oklahoma and Arkansas are expressly authorized by National Pollutant Discharge Elimination System (“NPDES”) permits in accordance with state law. *See* 27A Okla. Stat. § 2-6-401, *et seq.*;

Ark. Code Ann. § 8-5-201; *see also* Dkt. No. 2069 at 13-14 ¶¶49-53 (documenting state-authorized phosphorus discharges from Oklahoma WWTPs). The WWTPs in the IRW are not owned by Defendants, but are municipal or county waste water treatment plants that aggregate the wastewater of the community and discharge it into surface streams pursuant to state-issued permits governing their discharges. *See* Ex. A. at 28-31. It is well established that persons cannot be held liable for WWTP discharges authorized by and performed in accordance with the law. *See, e.g., Carson Harbor Village, Ltd. v. Unocal Corp.*, 270 F.3d 863, 869-70, 888 (9th Cir. 2001) (“Because [plaintiff] failed to show that the [utilities] violated the NPDES permits ... any pollutants discharged into the storm water were permissible.”); *see also* Dkt. No. 2033 at 17-20 (May 11, 2009); Dkt. No. 2055 at 13-19 (May 15, 2009); Dkt. No. 2057 at 16-22 (May 18, 2009); Dkt. No. 2166 at 1-7 (June 5, 2009).

Plaintiffs avoided Defendants’ motions to dismiss based on Clean Water Act preemption by asserting that their claims in this case have nothing to do with point-source discharges under the Clean Water Act, but rather address “non-point” runoff of surface waters. *See, e.g., Plaintiff’s Response in Opposition to “Peterson Farms, Inc.’s Motion to Dismiss or, in the Alternative, Motion to Stay Proceedings Pending Appropriate Regulatory Action”*, Dkt No. 134 at 10, 13 (explaining that Plaintiffs claims are based solely on alleged pollution from non-point sources, and therefore are not preempted by the Clean Water Act’s express permitting for point source discharges); *State of Oklahoma’s Memorandum in Opposition to Tyson Foods, Inc.’s Motion to Dismiss Counts 4-10 of the First Amended Complaint*, Dkt. No. 129, at 5-6, 10-22 (same)).

Since that time, the evidence in the case has revealed that a significant portion of the nutrients and bacteria in the IRW come from WWTPs, including materials that are deposited into the stream bed during low-flow periods and then resuspended in the water column during periods

of high water flow. Because this evidence contradicts Plaintiffs' claims, Defendants anticipate that Plaintiffs will attempt to introduce evidence at trial to blame the Defendants' corporate and meat-processing operations (not poultry litter used as a fertilizer) for the contributions of phosphorus and bacteria from WWTPs. For example, in Plaintiffs' expert report entitled, *Poultry Waste Generation and Land Application in the Illinois River Watershed and Phosphorus Loads to the Illinois River Watershed Streams*, Expert Report of Bernard Engel for the State of Oklahoma (May 22, 2008) ("Engel Report") (Ex. A), Dr. Engel asserts that "defendants' processing facilities discharge a significant amount of [phosphorus] to WWTPs and thus contribute to point [phosphorus] sources within the IRW." *Id.* at 28-31. In support of this contention, the Engel Report quantifies individual industrial phosphorus (P) discharges to the Springfield WWTP (one of 14 WWTPs identified by Engel), highlighting discharges from industrial facilities operated by certain Defendants. *See id.* at 30, Table 6.4 ("P Discharges to Springdale WWTP from Industrial Sources"). Based on the data set forth in the report, Engel opines that "[t]he defendants make a substantial contribution to point source P discharges from the Springdale WWTP ... [and] [t]he defendants' portion of P discharges through the Springdale WWTP represents a substantial amount of WWTP P discharges into IRW rivers and Lake Tenkiller." *Id.* at 30-31.¹

As this Court is aware, the total amount of WWTP phosphorus discharges to streams or rivers within the IRW is relevant in this matter because WWTP phosphorus discharges represent one of many alternate sources of phosphorus and bacteria in the IRW that Plaintiffs have not

¹ Plaintiffs have designated this same evidence for admission at trial. *See, e.g.*, Dkt. No. 2303-2 at 35, 42 (July 1, 2009) (Exhibits 1068-1069, 1243-1246). In addition to the reasons stated in this motion, this evidence should be excluded because Defendants were deprived of a meaningful opportunity to respond. As noted above, Plaintiffs produced this allegation with their expert reports (not in their complaint), and thus Defendants did not have notice and an opportunity to conduct discovery on the contributors to municipal wastewater.

accounted for in their causation analysis. *See* Ex. B at 2-3 to 2-4 (“There are many contributors of phosphorus to the Illinois River and Lake Tenkiller.”); *id.* at 2-32 to 2-37 (“Wastewater treatment plants appear to be the most important source of bioavailable phosphorus to the system.”); Ex. C at 29-37 (“Effluent and drainage water from urban areas in general, and municipal waste water treatment plants in particular, are major sources of P to surface waters in the IRW.”); *Attorney General of the State of Oklahoma v. Tyson Foods*, No. 08-5154, Slip Op. at 12-15 (10th Cir. May 13, 2009) (“Oklahoma’s inability to [link land-applied poultry litter and the bacteria in the IRW] meant that it could not establish that poultry litter may be a risk of harm in the IRW waterways. ... [T]he district court found that the bacteria in the IRW might be caused by any number of contributors, and that Oklahoma, by failing to account for alternative bacterial contributors, had failed to establish that poultry litter was one of those sources.... Thus, we find no abuse of discretion.”).

But, while the existence, amount and nature of state-authorized WWTP discharges in the IRW are relevant to show that Plaintiffs have once again blamed poultry litter to the exclusion of a host of other contributors, Plaintiffs are estopped from attempting to base their claims on any allegation or evidence that Defendants are responsible for point source discharges. Plaintiffs’ claims are premised solely on Defendants’ alleged non-point source discharges arising from the land application of poultry litter—not point source WWTP phosphorus discharges. *See* Second Amended Complaint, Dkt. No. 1215 at ¶¶47-63 (July 16, 2007). *See id.* Plaintiffs cannot have it both ways. Plaintiffs avoided dismissal by disavowing any reliance on point source contributions, including WWTP discharges. Now that the evidence shows WWTPs are the primary source of the problems Plaintiffs allege, Plaintiffs cannot attempt to blame poultry for the WWTPs, as well. Plaintiffs’ introduction of such data is improper and flatly prohibited by the rules of evidence, as the proposed reference to any Defendant’s contribution to WWTP

phosphorus discharges has no probative value to the claims in Plaintiffs' complaint, is misleading, and would serve only to prejudice Defendants and confuse or delay resolution of the actual issues in dispute. Accordingly, the Court should exclude the proposed evidence under Rules 402 and 403.

ARGUMENT

I. EVIDENCE REGARDING THE CONTRIBUTION OF WWTP DISCHARGES BY ANY DEFENDANT SHOULD BE EXCLUDED UNDER FRE 402 & 403

Federal Rule of Evidence 402 mandates that "[e]vidence which is not relevant is not admissible." Fed. R. Evid. 402. Federal Rule of Evidence 401 defines "relevant evidence" as:

[E]vidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Fed. R. Evid. 401. Pursuant to a separate analysis, Federal Rule of Evidence 403 provides that:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Fed. R. Evid. 403. The question of relevancy and the task of balancing the probative value of evidence against the dangers of unfair prejudice, confusion and other considerations are matters for the discretion of the trial court. *See Averitt v. Southland Motor Inn*, 720 F.2d 1178, 1181 (10th Cir. 1983); *Rigby v. Beech Aircraft Co.*, 548 F.2d 288, 293 (10th Cir. 1977). In the present matter, the Court should exercise its discretion to exclude any evidence regarding the contributions of any Defendant to WWTP discharges in the IRW. To do otherwise would re-insert issues of Clean Water Act preemption into the case and would result in substantial confusion about whether WWTP discharges can be considered as a basis for decision in this case, which they cannot.

A. Exclusion Is Proper Under FRE 402 Because the Evidence Is Not Relevant

Evidence of Defendants' contributions to WWTP discharges in the IRW is not relevant to any aspect of the present litigation. Plaintiffs' claims are based entirely on alleged non-point source discharges arising from the land application of poultry litter. *See* SAC ¶¶47-63; *supra* at 3-4. As a result, Defendants' liability cannot be premised upon any contribution to state-authorized WWTP phosphorus discharges.

Moreover, although the contribution from WWTP phosphorus discharges to streams or rivers in the IRW is relevant to show that Plaintiffs cannot establish a link between phosphorus in the IRW and poultry litter applied to fields, Defendants' alleged contribution to WWTP phosphorus discharges from meat-processing plants is immaterial to this analysis. The contribution of WWTPs to the watershed has been an issue throughout this case because it shows that the problems Plaintiffs allege are not caused by poultry litter spread on fields. Plaintiffs have asserted no claim based on an allegation that Defendants' meat-production factories contribute phosphorus to WWTPs. Allowing a side trial on whether, and to what extent, poultry processing plants account for a portion of the phosphorus that goes into municipal wastewater systems will delay and confuse the trial without shedding any light on the allegations set forth in the Second Amended Complaint. Because Defendants' contributions do not have "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence," Fed. R. Evid. 401, the proffered evidence must be excluded under Rule 402. *See* Fed. R. Evid. 402 ("Evidence which is not relevant is not admissible.").

B. Exclusion Is Proper Under FRE 403 Because the Evidence Is Prejudicial, Misleading and Confuses the Issues Without Providing Any Probative Value

As detailed *supra*, the attribution of specific amounts of WWTP discharges to Defendants

is not relevant to any aspect of Plaintiffs' claims, and lacks any probative value. In contrast, the evidence is clearly misleading and unfairly prejudicial to Defendants. By blaming the WWTP phosphorus discharges on Defendants, Plaintiffs imply that their failure to account for this alternate (and in fact most significant) source of phosphorus in the IRW is somehow harmless and that some aspect of Defendants' operations are really to blame even if it turns out that poultry litter is not the source of the problems Plaintiffs allege. Yet, in reality, the source of the state-authorized WWTP discharges is immaterial to establishing any link between phosphorus in the IRW and phosphorus compounds found in poultry litter.

Moreover, if such evidence were admitted, the proceedings would likely devolve into a mini-trial regarding Defendants' alleged contributions to WWTP discharges—particularly given that the discharges are authorized by and performed in compliance with NPDES under Oklahoma and Arkansas law. Such a result confuses the issues actually in dispute, uselessly delays the trial, and is to be avoided in accordance with Rule 403. *See, e.g., Unit Drilling Co. v. Enron Oil & Gas Co.*, 108 F.3d 1186, 1194 (10th Cir. 1997) (affirming exclusion of evidence of “limited” probative value that “could have lead to a side trial that would distract the jury from the main issues in the case”); *United States v. Talamante*, 981 F.2d 1153, 1156 & n.5 (10th Cir. 1992) (supporting exclusion of evidence that would “lead to collateral mini trials”).

In the present circumstances, the lack of any probative value is clearly and “substantially outweighed by the danger of” misleading the trier of fact, unfair prejudice, confusion of the issues, and considerations of undue delay. Fed. R. Evid. 403. As a result, the proposed evidence should be excluded under Rule 403.

CONCLUSION

For the foregoing reasons, the Court should grant Defendants' motion in limine to exclude evidence quantifying or attributing the contribution of WWTP discharges in the IRW by

any defendant.

Respectfully submitted,

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